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In the Supreme Court of the United States

THE CONSOLIDATED MUNICIPALITY
OF CARSON CITY, NEVADA,

Petitioner,

v.

DAVID Q. WEBB,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 692, 694 (1978), the Court held that municipality liability under 42 U.S.C. § 1983 may not rest on a theory of *respondeat superior* but requires a showing that the municipality *itself*, through "the execution of a government[al] policy or custom," "'cause[d]' an employee to violate another's constitutional rights." In *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986), the Court made clear that liability may be based on the single act of a municipal employee, but only if the employee has final authority to make policy for the municipality. In *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 126 (1988), the plurality cautioned that, "[i]f the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability."

The questions presented in this case are:

1. Whether NEV. REV. STAT. 252.070(1), which authorizes district attorneys to appoint deputies and provides that such deputies "may transact" all of the "official business" of their offices, confers "*final policymaking* authority" as a matter of law on those deputies.

2. Whether the municipality, or the plaintiff, bears the burden of proof in a § 1983 action to show that a subordinate official who allegedly has been delegated "final policymaking authority" by state law actually exercises such authority in practice, free from constraints imposed by his superiors.

RULE 14.1(b) STATEMENT

Pursuant to Rule 14.1(b), petitioner states that no parties before the court of appeals are not named in the caption. The caption in the Ninth Circuit also includes Darrin Sloan, Robert Guimont, Rod Ba[illegible]ter, and Does 1-10, but those individuals were not parties to petitioner's appeal against respondent Webb in the Ninth Circuit.

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OPINIONS BELOW

The opinion of the Ninth Circuit (App., *infra*, 1a-18a) is reported at 330 F.3d 1158. The district court's decisions granting in part and denying in part summary judgment and holding that deputy district attorneys in Nevada are policymakers as a matter of law (App., *infra*, 22a-50a, 51a-58a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2003. App., *infra*, 1a. On August 18, 2003, Justice O'Connor extended the time in which to file a petition for certiorari, to and including September 26. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Nevada Revised Statutes are set forth at App., *infra*, 59a-64a.

STATEMENT

In the decision below, the Ninth Circuit has ruled that deputy district attorneys in the State of Nevada are final policymakers *as a matter of law* for the purpose of affixing municipal liability under 42 U.S.C. § 1983 and *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658 (1978). The Ninth Circuit based its decision on nothing more than a Nevada statute – identical to or indistinguishable from statutes in many other States – that authorizes prosecuting attorneys to appoint deputies and, in turn, permits those deputies to "transact all official business relating to the[ir] offices to the same extent as their principals." NEV. REV. STAT. § 252.070(1). Under the Ninth Circuit's view, the Nevada legislature, by passing this statute in 1905, delegated *final* authority to every deputy district attorney in Nevada to *make policy* for his or her respective district attorney's office (and county). From that far-fetched holding,

and without evidence of any *other* baseless prosecutions, the Ninth Circuit reached the even more surprising conclusion that it is *municipal policy* in Carson City – not just individual misconduct – to effect baseless prosecutions. And the Ninth Circuit reached those conclusions even though the only evidence presented at trial as to whether the Carson City District Attorney's office actually had a policy of initiating or continuing prosecutions without probable cause – the "final policy" supposedly reflected in the actions of a deputy prosecuting attorney in this case – showed that the District Attorney had an official policy *against* pursuing such prosecutions.

The Ninth Circuit's decision converts the exercise of distinguishing municipal policy from individual misconduct into a farce. It ignores the plurality's admonition, in *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988), that "[i]f the mere exercise of *discretion* by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability." *Id.* at 126 (emphasis added). And, if left uncorrected, the Ninth Circuit's creation of an entirely new class of subordinate officials who will be treated as municipal policymakers *as a matter of law* (requiring no proof by a plaintiff) will have profoundly negative consequences that extend far beyond the halls of district attorneys' offices in Nevada and far beyond the borders of the State. In Nevada alone, deputy county assessors, deputy county recorders, deputy county clerks, deputy county treasurers, and deputy sheriffs all draw their statutory authority to act in the place of their principals from statutes containing identical or functionally identical language. Elsewhere in the Ninth Circuit, five States other than Nevada have deputy district attorneys who are mentioned in identical or indistinguishable statutes (in some of those States, other county officials' deputies are also mentioned in similar laws). Beyond that, several States outside the Ninth Circuit have statutes conveying similar authority to deputy or assistant prosecutors.

The consequences for the effective functioning of prosecutors would be especially severe. Prosecutors enjoy absolute

immunity from damages actions under 42 U.S.C. § 1983 challenging actions taken within the scope of their prosecutorial duties. See *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). Under the decision below, however, the very same conduct that is shielded by absolute immunity may be called into question in a suit brought against a municipality. If permitted to stand, the Ninth Circuit's decision will have the effect of eroding the sound public-policy foundation on which prosecutorial immunity is based and diminishing the important benefits of that immunity (that independent prosecutorial decisions not be affected by outside influences or fear of liability). To prevent those negative consequences, and clarify the principles governing municipal liability, review by this Court is warranted.

A. Factual Background

This case arises out of the arrest, incarceration, and prosecution of respondent David Webb by the Carson City's sheriff's and district attorney's offices. On June 27, 1997, Carson City Sheriff's Deputy Darrin Sloan observed a speeding vehicle, which he then chased until it pulled into the parking lot of the Carson City Inn. Appellant's C.A. Excerpts of Record ("ER") 115. The driver ran from the vehicle and jumped over a fence. Sloan chased the individual but lost sight of him in a trailer park behind the inn. Other officers set up a perimeter around the area. ER 116, 117. Deputy Sloan did not get a clear view of the driver but did notice that he was a black adult male wearing dark pants and no shirt. ER 115. As Sloan would later testify at trial, the suspect carried a backpack. ER 134.

After the unsuccessful foot pursuit, Deputy Sloan returned to inspect the abandoned vehicle and then heard over his radio that a black male was spotted running in the direction in which Sloan had chased his suspect and into the parking lot of a nearby office building called the Evergreen Center. ER 119, 135. Sloan later concluded, based on all the circumstances, that the individual detained by other officers at the Evergreen Center (respondent David Webb) was also the driver. ER 121-123.

At trial, Webb testified that during the evening he was out walking while waiting for his money to arrive so that he would be able to check into a motel. During his walk, and while he was in the bushes preparing to urinate, he heard someone yell "there's a black man." ER 108-111. He walked behind the Evergreen Center and hid behind a parked car. ER 112. Deputy Guimont found Webb there and detained him. ER 112-114. Webb was questioned and subsequently arrested after Deputy Sloan arrived and identified him as the man he had been chasing. ER 120. Webb was taken into custody, charged with various traffic offenses and with obstructing the police, and held in the local jail.

A week later, on July 3, 1997, Deputy Sloan received word that an informant who called the Sheriff's Department told another officer that a black man named Freddy Little was bragging about having escaped from the cops on the evening of June 27, 1997. ER 120. That information caused Sloan to doubt whether Webb was the individual he had chased. Sloan testified that he contacted Deputy District Attorney Melanie Bruketta and told her of the new information. Sloan testified that his discussion with Ms. Bruketta occurred on the first business day after July 4. ER 124. Ms. Bruketta, however, testified that she first received the possibly exculpatory information on the day she secured Webb's release: July 16, 1997. ER 132-133. The traffic charges against Webb eventually were dropped. Webb was later acquitted at a bench trial of obstructing or delaying a sheriff's deputy.

B. The Proceedings in the Trial Court

On November 26, 1997, respondent Webb filed a complaint in the United States District Court for the Northern District of Nevada. In the complaint, Webb advanced nine separate claims for relief under 42 U.S.C. § 1983 and state law. See App., *infra*, 4a n.3 (describing claims). Webb named as defendants Carson City Sheriff Rod Banister, Sheriff's Deputies Darrin Sloan and Robert Guimont, and Carson City. Notably, Webb did not name as defendants any of the deputy district attorneys who were

involved in his prosecution (all of whom were absolutely immune from liability). Sheriff Banister was dismissed on defendants' motion for summary judgment. App., *infra*, 41a-42a, 49a. Deputy Guimont was dismissed voluntarily by plaintiff Webb after jury selection but before the presentation of any evidence at trial. ER 105.

Following trial, the jury found in favor of Deputy Sloan on all claims against him, and in favor of petitioner Carson City on all claims against it related to Webb's arrest. The jury returned a judgment in favor of Webb, however, on his state tort claims against Carson City of false imprisonment, malicious prosecution, and misuse of process, and on his municipal liability claim under 42 U.S.C. § 1983 against the City based solely on the actions taken by prosecutors.

On three occasions, Carson City argued that there was no basis for finding municipal liability on Webb's claims. The first instance was in Carson City's opposition to Webb's motion for partial summary judgment. ER 60, 74-77. Carson City argued that it had no liability because Webb failed to establish that Carson City had a policy or custom of maliciously prosecuting or falsely imprisoning citizens, nor had he identified a policymaker for whom the City would have liability in an isolated instance. Webb's only argument regarding official policy and policymakers was to assert that NEV. REV. STAT. 252.070(1) grants a deputy district attorney the authority to transact all official business to the same extent as the district attorney, and that a deputy district attorney "therefore had *policy-making* authority" to dismiss unfounded charges (and thus "became a policymaker whose decisions bound Defendant Carson City for purposes of section 1983"). Plaintiff's Motion for Partial Summary Judgment, at 23 (July 10, 2000) (emphasis added).[1] Despite the absence of any evidence of a delegation of

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[1] In advancing this argument, Webb was merely reiterating the district court's rationale in its earlier opinion denying in part and granting in part the defendants' motion for summary judgment. See App., *infra*, 42a-44a.

authority to Carson City deputy district attorneys or any evidence of a pervasive custom or practice of the City to prosecute or imprison without probable cause, the district court agreed that Nevada law confers on deputy district attorneys final policymaking authority. App., *infra*, 42a-44a, 49a, 57a.

At trial, Webb testified and called three other witnesses: Sheriff's Deputies Sloan and Guimont, and Beverly Moltz, a sergeant with the Carson City Sheriff's Department at the time of Webb's arrest. None of Webb's witnesses offered any evidence regarding policies, customs, or practices of the Carson City District Attorney's Office, or about who has policymaking authority in that office, or about who may have been delegated such authority within the office.

At the close of Webb's case, Carson City renewed its argument that Webb had failed to provide any evidence sufficient to impose municipal liability on the City. ER 125, 126. The court again denied the City's motion to dismiss claims against it, holding that deputy district attorneys are final policymakers for municipalities in the State of Nevada as a matter of law.

During their case-in-chief, petitioner Carson City and the other defendants called Deputy District Attorney Melanie Bruketta. Ms. Bruketta was asked about the district attorney's office policy regarding prosecution and probable cause (ER 133):

> Q Now, does the Carson City district attorney's office have a policy of prosecuting individuals without probable cause?
>
> A No.
>
> Q Is the opposite the case, that there's a policy of not prosecuting individuals if probable cause does not exist to do so?
>
> A If probable cause does not exist, we will not prosecute.

On cross-examination, Ms. Bruketta was questioned about the power that rests in the Office of the District Attorney. She

testified that the office does have the power to determine who will be prosecuted, the power to decline to go forward with a case, and the power to recommend dismissal of a case. Webb's counsel asked Ms. Bruketta no questions regarding whether, as a deputy district attorney, she had policymaking authority or had been delegated such authority by the district attorney or any other city official. Her testimony was the only evidence presented at trial concerning the authority of a deputy district attorney. As noted above, respondent did not name any deputy district attorney as a defendant in his lawsuit, and he called none to testify regarding the prosecution of criminal charges against him. Thus, the record is bereft of any evidence to suggest either an actual policy on the part of Carson City, a custom or practice that could give rise to an inference that a policy existed, or a delegation of authority to a deputy district attorney by anyone.

At the instruction conference, held after the close of evidence, Carson City again objected to the district court's ruling that deputy district attorneys are policymakers. Over the City's objection, the Court gave three instructions that established for the jurors that deputy district attorneys are policymakers as a matter of law (ER 138-140):

> Instruction No. 61. The acts or omissions of a Deputy District Attorney constitute official policy of the city and/or county of Carson City, Nevada.
>
> Instruction No. 62. If you find that the acts of any policymaker in his or her official capacity deprived plaintiff of his constitutional rights, Defendant Carson City will be liable for such depravations [*sic*].

Instruction No. 63. When a government decision maker has final authority to establish governmental policy with respect to the action ordered or omitted, and a deliberate choice to follow a course of action is made from among various alternatives, governmental liability can be found based on a single incident of alleged wrongful activity.

The jury was provided with special interrogatories as to Carson City. The first asked "Did [P]laintiff prove that Defendant Carson City has a custom, policy, or practice that violated the Plaintiff's federal constitutional right not to be prosecuted without probable cause?" The jury answered "yes." ER 141. The third special interrogatory asked, "Did Plaintiff prove that Defendant Carson City has a custom, policy, or practice to falsely imprison individuals?" The jury answered "yes." ER 142.

These were the only federal claims for which the jury found Carson City liable. The jury also found that Carson City had committed the state torts of false imprisonment, malicious prosecution, and misuse of process. It is Carson City's position, however – preserved in the trial court and on appeal – that state sovereign immunity bars awards against Carson City for those state torts. See note 3, *infra*.

C. The Court of Appeals' Decision

A panel of the Ninth Circuit affirmed. App., *infra*, 1a-18a.[2] As an initial matter, the panel acknowledged that municipal liability under 42 U.S.C. § 1983 "cannot be founded on a theory of *respondeat superior*." App., *infra*,6a. In enacting the statute, the panel explained, Congress "intended to hold municipalities

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[2] In an unpublished decision, the Ninth Circuit also resolved respondent Webb's cross-appeal concerning attorney's fees and other issues. See App., *infra*, 19a-21a.

liable only when action pursuant to official municipal policy of some nature caused a constitutional tort." *Ibid.* (internal quotations omitted). "Generally, then," the panel explained, "the actions of individual employees can support liability against a municipality under § 1983 only if the employees were acting pursuant to an official municipal policy." *Ibid.*

Next, the panel identified "two alternative ways" under the Ninth Circuit's case law that municipal liability "can attach" even if a municipality has not "expressly adopted" a policy. App., *infra*, 6a. The court explained:

> First, if an employee commits a constitutional violation pursuant to a long-standing practice or custom, the employee's act is sufficient to support municipal liability. By contrast, "[a] single constitutional deprivation ordinarily is insufficient to establish a longstanding practice or custom." [Second,] [a] municipality can be liable even for an isolated constitutional violation * * * when the person causing the violation has final policymaking authority.

Id. at 7a (citations omitted). Under the first alternative, the court explained, a plaintiff "must prove the existence of a long-standing practice or policy to the satisfaction of the fact-finder." *Ibid.* Under the second alternative, however, "the court must decide, as a matter of state law and before the case may be submitted to the jury, whether the person who committed the violation had final policymaking authority." *Ibid.*

Next, the Ninth Circuit held that there was no reason to examine Webb's argument under the first alternative ("that Carson City had a longstanding practice or custom of incarcerating and prosecuting people it knows to be innocent") because it agreed with Webb that he had satisfied the second method. App., *infra*, 7a. The panel proceeded to quote the Nevada statute that provides: "All district attorneys are authorized to appoint deputies, who may transact all official business relating to the offices to the same extent as their principals." NEV. REV. STAT. 252.070(1). "By its plain text," the panel reasoned, this

provision "confers *authority* on deputy district attorneys that is coextensive with the authority enjoyed by principal district attorneys." App., *infra*, 8a (emphasis added). Without pausing to examine the distinction between the authority to *take particular action* and the authority to *make municipal policy*, the panel asserted that, "if principal district attorneys are final policymakers, then so are their deputies." *Ibid.*

The panel further declared that the question whether "the *principal* prosecutor has final policymaking authority" is "easily resolved." App., *infra*, 8a (emphasis added). Because Nevada law grants to the district attorney the entire control over the prosecution of a criminal case, the court reasoned, the district attorney is a final policymaker "in the particular area or particular issue relevant here: the decision to continue to imprison and to prosecute." *Ibid.* That conclusion, the panel continued, is in no way undercut by the fact that the state attorney general exercises supervisory authority over the county district attorneys. Under Nevada law, the attorney general's oversight powers are "discretionary and permissive"; and, "[i]n light of [Nevada case law], and in the absence of any evidence in the record that the attorney general in fact ever exercises that supervisory power," the court "h[e]ld that principal district attorneys are final policymakers for the municipality with respect to the conduct of criminal prosecutions." *Id.* at 8a-9a.

Turning to the role of deputy prosecutors, the panel reiterated its view that NEV. REV. STAT. 252.070(1) "confers the same final policymaking authority on deputy district attorneys." App., *infra*, 9a. "The principal," the panel reasoned, "does not delegate constrained discretion to a deputy upon appointment. Rather, the legislature states that, upon appointment, deputies may transact all official duties *to the same extent as* their principals." *Ibid.*; see also *id.* at 10a (stating that the legislature had "directly delegate[d] coextensive authority to the principal prosecutor and the deputies"). Notwithstanding this supposed directive by the Nevada legislature, the panel left open the

possibility that a deputy prosecutor's authority might be limited by his superior:

> We are mindful that the Nevada statutory text is permissive, not mandatory: Deputies *may* transact official business to the same extent as their principals. Conceivably, the principal prosecutor could constrain that authority. That possibility does not change our analysis, because Carson City presented no evidence that its principal district attorney actually has constrained the deputies' authority. In fact, Carson City presented evidence to the contrary.

Id. at 10a; see also *ibid.* (noting that "Carson City presented affirmative evidence that any deputy in the office could have made the decision to dismiss the charges against [Webb] without consulting any supervisor"). The Ninth Circuit made no effort at all to explain how case-specific decisions about how to handle Webb's case could be viewed as *municipal policy*; rather, it seemed to think that how to handle Webb's case was *ipso facto* a question of municipal policy, and that it need only address who had decisionmaking authority.[3]

REASONS FOR GRANTING THE PETITION

This case raises vitally important questions concerning the scope of municipal liability under 42 U.S.C. § 1983. Twenty-five years ago, this Court held that municipalities and other bodies of local government are "persons" within the meaning of § 1983. *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658 (1978). The Court further held that § 1983 authorizes suit for constitutional deprivations occurring as the result of governmental custom even though such a custom has not received formal approval through the official decisionmaking channels. The Court concluded, however, that the doctrine of

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[3] The panel found it unnecessary to consider Carson City's challenge to the state law counts, explaining that the verdict could and would stand if the federal municipal liability claims were valid (which the court held they were). App., *infra*, 11a-12a.

respondeat superior was inappropriate in the context of §1983 and decided that municipalities can be held liable only when the constitutional injury was caused by a municipality's lawmakers or those whose edicts or acts may fairly be said to represent official policy.

Those principles were further refined in *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986), and *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988). In *Pembaur*, the Court held that municipalities may be held liable under §1983 only for acts that the municipality has officially sanctioned or ordered. Furthermore, only municipal officials who have final policymaking authority may, by the exercise of that authority, subject the municipality to liability. The court held that whether a particular official has final policymaking authority is a question to be decided by applying state law. Finally, the Court suggested that the challenged action must have been one that falls within the area of responsibility of that official under state law.

In *Praprotnik*, this Court undertook a review of its decisions in cases involving isolated acts by government officials and employees and divergent interpretations of those principles by courts of appeals. The Court held that the identification of policymaking officials is to be decided by applying state law and that the authority to make such policy may be granted directly by a legislative enactment. The plurality in *Praprotnik* also cautioned that, "[i]f the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability." 485 U.S. at 126.

The Ninth Circuit in this case lost sight of the nature of its task: rather than consider who has authority to make *municipal policy* – the question that this Court's precedents dictate must be asked *even when the single act of one individual is at issue* – the Ninth Circuit focused on who had *decisionmaking authority* about Mr. Webb's prosecution, as if every decision about every prosecution were *ipso facto* the making of municipal policy. In making that error, the Ninth Circuit contradicted this

Court's precedents and placed itself in conflict with many other circuits, yet simultaneously showed the need for this Court to speak more clearly as to the nature of the inquiry at issue – in essence, to complete the unfinished work of *Praprotnik*, in which there was no majority opinion. Likewise, in placing the burden of proof on the municipality to rebut the assumption that subordinates are unconstrained by their superiors, rather than placing the burden of proof on the § 1983 plaintiff to show that the subordinate and not the superior is the real policymaker, the Ninth Circuit erred and created a circuit conflict. Review of both issues is fully warranted.

I. THE COURT SHOULD REVIEW WHETHER DEPUTY PROSECUTORS ARE FINAL POLICY-MAKERS AS A MATTER OF LAW

1.a. In holding that all deputy prosecutors in Nevada are "final policymakers" (so that even their isolated actions may serve as the basis for a claim of municipal liability against the counties where they work), the Ninth Circuit relied on nothing more than a Nevada statute, NEV. REV. STAT. 252.070(1), which provides:

> All district attorneys are authorized to appoint deputies, who may transact all official business relating to the offices to the same extent as their principals.

This language entered the Nevada Revised Statutes by way of a 1905 amendment. Statutes of Nevada, 1905, p. 33.

The "official business" relating to the Office of the District Attorney is laid out throughout the Nevada Revised Statutes. The district attorney is the public prosecutor. NEV. REV. STAT. 252.080. He is required to attend the district courts for the transaction of criminal business. NEV. REV. STAT. 252.090. The district attorney must draw all indictments when required to do so by the grand jury, defend all suits brought against his county, prosecute the recovery of bonds, debts, fines, penalties, and forfeitures accruing to the county, draw legal papers and give written opinions on matters relating to the duties of the

governing body, bring all actions on behalf of the county for the abatement of nuisances, and perform such other duties as may be required of him by law. NEV. REV. STAT. 252.090.

The Ninth Circuit's discovery in the language of § 252.070(1) of a grant of final *policymaking* authority to *deputy* district attorneys finds no support in the statute. The correct reading of the statute is that it allows the district attorney to carry out his statutory responsibilities through deputies.

It is implausible that the language of NEV. REV. STAT. 252.070(1) creates "coextensive authority" in district attorneys and their appointed deputies as the Ninth Circuit held, especially not when it comes to *making policy*. If that were the meaning of the statute, there would be no distinction at all between a district attorney and his deputies. Each deputy would have the power to establish office – and, under the Ninth Circuit's view, therefore municipal – policy on hiring and firing, policy on budget matters, and even policy about what hours the office is to remain open.

Furthermore, at least partly as a result of its misplaced focus on *decisionmaking* authority as opposed to *policy-making* authority, the Ninth Circuit misapprehended the evidence in the record. The Ninth Circuit grudgingly conceded only that it is "conceivable" that the principal prosecutor could constrain what the court apparently viewed as the unfettered power of a deputy district attorney to act – and therefore, as the court saw it, to make municipal policy – completely independently. But, the court said, "that possibility does not change our analysis, because Carson City presented no evidence that its principal district attorney actually has constrained the deputies' authority. In fact, Carson City presented evidence to the contrary." App., *infra*, 10a.

The Ninth Circuit's analysis does not withstand scrutiny. First, to uphold the district court's instructions, the Ninth Circuit had to conclude – and did conclude – that the question whether a deputy district attorney is a policymaker can be resolved by

looking at the bare language of state statutes, not the evidence in the record. It is unclear how a district attorney could take away from his deputies the policymaking authority that the courts below concluded the Nevada legislature has unequivocally granted to deputy district attorneys. Moreover, in this case, respondent Webb, who bears the burden of proof, offered no evidence whatsoever to show that the district attorney or the municipality constrained or did not constrain the actions of the deputy district attorneys. Webb did not call the district attorney or any municipal official in his case-in-chief, nor did he call any deputy district attorney. Rather, the defendants called Deputy District Attorney Melanie Bruketta during their case-in-chief. Ms. Bruketta was asked about the district attorney's office policy regarding prosecution and probable cause and testified unequivocally that office policy was *not* to prosecute without probable cause. See pages 6-7, *supra*.

On cross-examination, Ms. Bruketta answered "yes" when asked if the "Carson City District Attorney's Office has the power to determine who will be prosecuted." She also answered in the affirmative when asked if she had the authority to seek dismissal of a case. Her testimony is the sum of the evidence presented on the authority of deputy district attorneys in the Carson City District Attorney's Office. Contrary to the conclusion reached by the Ninth Circuit, this is evidence that deputy district attorneys in the office *are* constrained by a policy not of their own making: That prosecutions without probable cause were not permitted as a matter of the policy of the office. Far from being evidence of final policymaking authority for the municipality of Carson City, this is evidence of policy's being made by the district attorney constraining his deputies, and discretion's being granted those deputies to make decisions to proceed or not proceed with prosecutions within the bounds of the policy.

A plurality of this Court warned in *Praprotnik* against confusing policymaking authority with discretion:

> If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability. If, however, a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its intended purpose. It may not be possible to draw an elegant line that will resolve this conundrum, but certain principles should provide useful guidance.

485 U.S. at 126-127. One of the guiding principles laid out by the *Praprotnik* plurality was that, when an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. In this case, the evidence shows at most that deputy district attorneys in the Carson City District Attorney's Office had the *discretion* to proceed or not proceed with prosecutions, constrained by the office policy of not prosecuting in the absence of probable cause. Since that is the case, it is not only conceivable that the district attorney has the power to constrain the actions of his deputies, it stands unrebutted that the district attorney has exercised his authority to do so. It is the district attorney's policy, not a subordinate's deviation from the policy, that constitutes the act of the municipality.

b. The Ninth Circuit reached the conclusion that district attorneys in Nevada have final policymaking authority based on the direction of *Pembaur* and *Praprotnik* that it look to state law for a delegation of final policymaking authority. But the Nevada statute does not address policymaking authority. And the Nevada cases relied on by the Ninth Circuit discuss the autonomy of the district attorney in his prosecutorial role, not his final policymaking authority or his power to delegate it to deputies. In *Cairns* v. *Sheriff, Clark County*, 508 P.2d 1015, 1017 (Nev. 1973), the Nevada Supreme Court held that "the matter of the prosecution of any criminal case is within the entire control of the district attorney." In *Cairns*, the plaintiff

challenged, on equal protection grounds, the decision by a prosecutor to grant immunity to one of several suspects in a narcotics case. The Nevada Supreme Court, in rejecting a petition for a writ of habeas corpus by one of the prosecuted suspects, cited NEV. REV. STAT. 252.110 for the proposition that the prosecution of any criminal case is within the control of the district attorney, and that prosecuting some, but not all the suspects, did not violate the constitutional rights of those prosecuted. Whatever that decision, it lies exclusively with the district attorney and is not subject to challenge. *Cairns,* rather than identifying a source of final authority to make municipal policy, shows the wide latitude and discretion district attorneys exercise.

Similarly, in *Lane* v. *Second Judicial Dist. Court*, 760 P.2d 1245, 1251 (Nev. 1988), the question was whether the district attorney or the district court had the authority to control the activities of a grand jury. Again, this decision has no bearing on an analysis of whether a *deputy* district attorney is vested with final *policymaking* authority for a municipality in Nevada.

The opinion below also brushes aside in a footnote the fact that the same language that applies to deputy district attorneys is used in Nevada statutes describing the powers of deputy county clerks (NEV. REV. STAT. 246.030(1)); deputy county recorders (NEV. REV. STAT. 247.040(1)); and deputy county assessors (NEV. REV. STAT. 250.060(1)). The Ninth Circuit dismissed an argument that it was creating municipal policymakers in all of these deputy county officials in Nevada by stating that it had not determined that their principals were final policymakers. Under the Ninth Circuit's analysis, however, even deputy sheriffs in Nevada become municipal policymakers. NEV. REV. STAT. 248.040(1) provides in pertinent part that each sheriff may "[a]ppoint in writing signed by him, one or more deputies, who may perform *all the duties devolving on the sheriff* of the county" (emphasis added). The Ninth Circuit offered no hint as to how it might distinguish

county clerks or sheriffs from district attorneys under the statutory scheme, and in fact, under state law, there is no distinction.

c. The effect of the Ninth Circuit's decision is not limited to Nevada or even, foreseeably, to the Ninth Circuit. In addition to Nevada, at least five States within the Ninth Circuit – Arizona, California, Idaho, Montana and Washington – have statutes that describe the powers and duties of deputy prosecutors in terms that are similar to NEV. REV. STAT. § 252.070(1). Thus, in Arizona, "each deputy of a state or county officer possesses the powers and may perform the duties prescribed by law for the office of the principal." ARIZ. REV. STAT. § 38-462(A). Furthermore, "when the official name of any principal officer is used in law conferring power, or imposing duties, liabilities or prohibitions, it includes the officers' deputies." *Id.* § 38-462(B). In like manner, Washington law provides that a "prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal." REV. CODE OF WASHINGTON § 36.27.040. And California law provides that district attorneys (as well as deputy sheriffs, deputy clerks, deputy treasurers, deputy assessors and deputy school superintendents) qualify as county officers, and it further provides that, "[w]henever the official name of any principal officer is used in any law conferring power or imposing duties or liabilities, it includes deputies." CAL. GOV. CODE, Title 3, § 24000, 24100.[4] Moreover, at least five States outside of the Ninth Circuit have statutes granting assistant or deputy prosecutors power to perform all the duties of the district attorney.[5]

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[4] See also IDAHO CODE, Chapter 20, §§ 31-2001, 31-2008 (listing prosecuting attorney as county officer and providing that, "[w]henever the official name of any principal officer is used in any law conferring power, or imposing duties or liabilities, it includes his deputies"); MONTANA CODE ANNOTATED, Part 24, §§ 7-4-2403, 7-4-2701 (same).

[5] See STATUTES OF MINNESOTA § 388.10; N.M. STAT. ANN. § 36-1-2; STATUTES OF NORTH DAKOTA § 11-16-02; TEX. GOV'T CODE § 41.103;

By confusing *decisionmaking* authority with *policymaking* authority, and uncritically equating *subordinate* officials with their principals, the Ninth Circuit has opened the floodgates to hold every municipality liable for every act of every low-level bureaucrat – exactly what the plurality in *Praprotnik* warned would happen if "the mere exercise of discretion by an employee" were equated with municipal policy. 485 U.S. at 126. Such a far-reaching decision, from the Nation's most populous judicial circuit, should not be allowed to stand unreviewed.[6]

The decision below, with its unquestioning reliance on state law to the exclusion of all other evidence, also goes much further than the Court contemplated in *McMillian* v. *Monroe County*, 520 U.S. 781 (1997) – and indeed is inconsistent with that decision. *McMillian* cautions that mere labels in state law may not provide a clear answer to the question of who has final policymaking authority, noting that, for example, labeling an official who makes county policy as a state official would not be dispositive on the question of whether the official was a state official protected by Eleventh Amendment immunity, or, on the other hand, an official acting on behalf of the county. *Id.* at 786. Instead, the Court stated, "our understanding of *the actual function* of a governmental official, in a particular area, will necessarily be *dependent* on the definition of the official's

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W. VA. CODE § 7-7-8.

[6] Unfortunately, the decision below is not the only recent instance of the Ninth Circuit's straying from this Court's decisions concerning municipal liability and thereby creating vast new areas of liability under 42 U.S.C. § 1983. See *Miranda* v. *Clark County, Nevada*, 319 F.3d 465 (9th Cir. 2003) (en banc) (holding that Nevada counties may be liable for litigation-related "administrative" policies of a Chief Public Defender even though deputy public defenders are not state actors under *Polk County* v. *Dodson*, 454 U.S. 312 (1981)), *petition for cert. pending*, No. 02-1629. If the Court grants the petition in *Miranda*, it should at least hold this case pending the resolution of the *Monell* issue raised in that case.

functions under relevant state law." *Ibid.* Thus, *McMillian* makes clear that state law is but one source for determining whether the "actual function" of a particular official includes the final authority to make policy for the municipality.

The difficulties that arise in making a determination about who has final policymaking authority, and even what constitutes policy, were recognized even as this Court attempted to clarify the issue in *Praprotnik*. ("We are, of course, not predicting that state law will always speak with perfect clarity." 485 U.S. at 126.) The Court also recognized that, in the absence of clear state law on the subject, difficult questions would arise where the case involved a delegation of final policymaking authority, because delegated discretion does not rise to the level of final policymaking, and in turn, the liability based on the mere exercise of discretion cannot be readily distinguished from *respondeat superior* liability.

This case offers an opportunity for this Court to revisit and attempt to come closer to drawing an "elegant line that will resolve this conundrum." *Praprotnik*, 485 U.S. at 127 (plurality opinion). In *Pembaur*, the plurality opinion observed that "[t]he fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." 475 U.S. at 481-482. There must be, in addition to discretion, a direct grant of final policymaking authority by legislative enactment or proof of a delegation by one official authorized to make final policy to another. *Id.* at 483.

Justice Powell's dissent, in which Chief Justice Burger and Justice Rehnquist joined, was prescient when applied to this case and the probable effect on other jurisdictions of the Ninth Circuit's decision. Justice Powell criticized the reliance by the Court in *Pembaur* on the *identity* of the decisionmaker as the key consideration in the search for a final policymaker. Justice Powell wrote that:

> the question whether official policy — in any normal sense of the term — has been made in a particular case is not answered by explaining who has final authority to make policy. The question here is not "*could* the County Prosecutor make policy?" but rather, "did he make policy?"

Id. at 498. Justice Powell noted that the Court found state law authority for the existence of policymaking authority residing in the prosecutor, but no discussion to show that the prosecutor actually used the authority to establish official county policy in that case. In the decision below, the Ninth Circuit has gone far beyond what the dissenters feared: It has found final "policymaking" authority in a *subordinate* official purely as a matter of state law, with no concern about whether the acts complained of actually were an exercise of that policymaking authority, and with no effort to distinguish *policymaking* authority from decisionmaking discretion.

The division of the Court in *Pembaur* was unfortunately not resolved by *Praprotnik*. In another plurality decision, the Court expressed a new confidence (which soon seemed to ebb) that state law "will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of local government's business." 485 U.S. at 125. However, the plurality then outlined several scenarios in which total reliance on a state law might not fully answer the question of who has final policymaking authority. For example, the plurality again noted that the mere exercise of discretion was insufficient as a basis for siting final policymaking authority. *Id.* at 126. It held that, when an official's acts are constrained by a policy not of his own making, the policy, not the deviations from it, are the act of the municipality. *Id.* at 127. The plurality pointed out that merely going along with the discretionary decision of subordinates is not a delegation of authority to make policy. *Id.* at 130. It held that the failure of a principal to investigate the discretionary decisions of a subordinate (even if wrong) is not a delegation of authority: "In such circumstances, the purposes of [Section]1983 would not be

served by treating a subordinate employees' decision as if it were a reflection of municipal policy." *Id.* at 130. All of this analysis seems to suggest that a finding of final municipal policymaking authority may often rest on more than simply reading and interpreting state law, but on evidence in the record of whether a given official is acting to make policy.

Justice Brennan, concurring and joined by Justices Marshall and Blackmun, asserted that state law was only a starting point in determining who has final policymaking authority. Therefore, while the record showed that an official had authority to act in a certain area, there was no evidence that, when he acted, he acted with the authority to make policy. In the absence of evidence in the record to the contrary, that official was exercising discretion, not policymaking authority.

d. Unsurprisingly, the Ninth Circuit's decision to depart from this Court's precedents places it in conflict with many other circuits. Just last month, for example, a Second Circuit panel speaking through Judge Sotomayor rejected the very argument the Ninth Circuit accepted in this case, *i.e.*, that a subordinate official's authority to make decisions about how to handle *one situation* necessarily constitutes policymaking authority. *Anthony* v. *City of New York*, 339 F.3d 129 (2d Cir. 2003). A disabled woman was seized and taken to a psychiatric hospital on the order of a New York City police sergeant. She argued that the sergeant "had decision-making authority over the conduct of the officers at the scene." *Id.* at 139. A unanimous panel rejected that argument as a basis for municipal liability (*id.* at 139-140):

> Anthony does not provide any analogue to the state-law authority that a county sheriff possesses, and instead argues only that Sergeant Mendez is a final decision-maker because he had discretion to determine how to handle the particular situation at Wright's apartment. But in *Jeffes* [v. *Barnes*, 208 F.3d 49 (2d Cir.), cert. denied, 531 U.S. 813 (2000)], we explicitly rejected the view that mere exercise of discretion was sufficient to establish municipal liability.

> *See id.* at 57 ("It does not suffice for these purposes that the official has been granted discretion in the performance of his duties." (citing *St. Louis* v. *Praprotnik*, 485 U.S. 112, 127 * * * (1988))). We accordingly reject Anthony's argument that Sergeant Mendez's order constitutes an official municipal policy.

Likewise, in *Brady* v. *Fort Bend County*, 145 F.3d 691 (1998), cert. denied, 525 U.S. 1105 (1999), the Fifth Circuit explained why an actual municipal policy – like the Carson City policy *against* baseless prosecutions shown by Deputy District Attorney Bruketta's undisputed testimony (pages 6-7, *supra*) – flatly precludes municipal liability for individual departures from that policy (145 F.3d at 698-699 (emphasis added)):

> Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal authority with respect to the action ordered. The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. * * * If county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. *This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board.*

Accord *Triplett* v. *District of Columbia*, 108 F.3d 1450, 1453-1454 (D.C. Cir. 1997) (Williams, J.).

In *Monfils* v. *Taylor*, 165 F.3d 511 (7th Cir. 1998), cert. denied, 528 U.S. 810 (1999), a deputy chief of detectives acted unconstitutionally by allowing the identity of an anonymous tipster to become public; the mutilated body of the tipster was

then found at the bottom of a two-story vat at a paper mill, with a rope with a 50-pound weight tied to the neck of the dead tipster. Like the deputy district attorney in the present case, the deputy chief of detectives had unquestioned authority to make decisions about how to handle the situation, but the Seventh Circuit had not the slightest trouble recognizing that the city that employed him was not liable for the discrete act of a mere subordinate official. *Id.* at 517.

Because the Ninth Circuit has so badly misunderstood the inquiry consistently dictated by this Court's cases, the list of decisions of other courts of appeals with which the decision below conflicts – decisions that correctly appreciate the need to find *policymaking*, not just *decisionmaking*, authority before a municipality will be held liable – could go on and on. These illustrative decisions from the D.C., Second, Fifth, and Seventh Circuits, however, suffice to show the circuit conflict in need of this Court's attention.

2. The decision below also seriously erodes the protection afforded the prosecutorial function by absolute immunity. In his dissent in *Pembaur*, joined by Chief Justice Burger and Justice Rehnquist, Justice Powell persuasively argued that absolute immunity was necessary for the prosecutorial process, even in the context of municipal liability:

> Moreover, there is a significant cost to the unwarranted deterrence of law enforcement officials. We recognized in *Imbler* a strong state interest in "vigorous and fearless" prosecution, and found that to be "essential to the proper functioning of the criminal justice system." Those same general concerns apply to other law enforcement officials. Unwarranted deterrence has the undesirable effect of discouraging conduct that is essential to our justice system and protects the State's interest in public safety. * * * It is no answer to say that some officials are entitled either to absolute or qualified immunity. It ignores reality to say that if petitioner is successful in his $20-million suit it will

> not have a chilling effect on law enforcement practices in Hamilton County.

475 U.S. at 496 (citing *Imbler* v. *Pachtman*, 424 U.S. 409 (1976)) (internal citations omitted)

In *Imbler*, this Court considered whether the same considerations of public policy that support common law immunity for prosecutors could be the basis for absolute immunity for prosecutors under § 1983. This Court, quoting from *Pearson* v. *Reed*, 6 Cal. App. 2d 277, 287, 44 P.2d 592, 597 (1935), stated:

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. * * * The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement.

424 U.S. at 422-423. The Court in *Imbler* held that these public-policy considerations justified affording prosecutors absolute immunity from suit under § 1983.[7] The court noted

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[7] Plaintiff, recognizing the existence of absolute immunity for prosecutors, did not name the district attorney or any deputy district attorney as a defendant in his complaint. Nor did he call any member of the District Attorney's Office as a witness at trial. In fact, the complaint does not allege that municipal liability for Carson City arose as a matter

that a prosecutor is duty-bound to exercise his or her best judgment in deciding which prosecutions to initiate and in conducting them. It noted that public trust in the prosecutor's office would suffer if the prosecutor's decisions were made in consideration of his or her own potential liability in a suit for damages and predicted that such suits could be expected with "some frequency" as defendants ascribed improper or malicious motives to prosecutors.

The Court also discussed practical considerations for affording absolute immunity under § 1983. The presentation of issues relating to prosecutorial conduct or misconduct in a § 1983 action would often require a retrial of the criminal offense in a new forum and the resolution of technical issues by a lay jury The Court noted that prosecutors frequently act under serious constraints of time and information and that a prosecutor "inevitably makes many decisions that could engender colorable claims of constitutional deprivation." 424 U.S. at 425-426.

The Court also recognized the systemic consequences of permitting only qualified immunity to a prosecutor. It pointed out that the goal of the criminal justice system is accurately to determine guilt or innocence and that this process requires that both the prosecution and the defense have broad discretion in the conduct of trials and the presentation of evidence. Furthermore, because the truthfulness of witnesses in criminal cases is subject to doubt both before and after they testify, if prosecutors were deterred from using such witnesses by concern about resulting personal liability, the triers of fact often would be denied relevant evidence. 424 U.S. at 426.

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of law based on a state statute; rather, the complaint alleged that the City was liable based either on a prevalent practice of retaliatory prosecution or on City ratification of the unconstitutional act of a deputy district attorney who was a policymaker. Appellee-Plaintiff's C.A. Excerpts of Record, at 78, 86-87, 94-95.

In the decision below, the Ninth Circuit did not directly diminish an individual prosecutor's individual immunity, but by creating municipal liability as a matter of law for deputy district attorneys, it opened the way for the same influences to infect the process. Now, if the decision below stands, a deputy prosecutor must consider whether his or her conduct will bring upon his or her employer liability for decisions about whether to initiate or continue a prosecution. Now, the prosecutor must be concerned about the prospect of incurring such liability for a city and currying disfavor from his employer for doing so. Now, the apprehension of liability for any failed prosecution not only could, but must, color every decision by the deputy prosecutor. What a plaintiff previously could not do directly to a deputy prosecutor, he or she can now do indirectly if the decision below stands. Conscientious prosecutors are, after all, employees of the cities and counties they serve, and must be concerned with the financial consequences of any failed prosecution.

The Court should not allow these untoward consequences to occur without review of the fundamentally flawed decision below. If *Pembaur* and *Praprotnik* have failed to make clear that it is *policymaking* authority – not mere *decisionmaking* discretion – that must be found to support municipal liability, then now is the time and this is the case to make that clear. The Nation's most populous circuit should not have a rule of law that subjects municipalities to liability so plainly unsupported by this Court's decisions.

II. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT OVER WHO HAS THE BURDEN OF PROVING THE EXISTENCE OF FINAL POLICYMAKING AUTHORITY

The Ninth Circuit based its determination that deputy district attorneys are final policymakers in Nevada in part on its determination that Carson City presented no evidence that the district attorney had constrained the deputies' authority. In addition to raising questions about how a district attorney might

constrain coextensive powers directly granted to his deputies by the legislature, the Ninth Circuit shifted the burden of proof from the plaintiff to the City (to show a lack of final policymaking authority on the part of deputy district attorneys where they were constrained by the policies of the district attorney). Other circuits have reversed jury verdicts when *plaintiffs* have submitted insufficient evidence of policymaking to support a finding of municipal liability.

In *Austin* v. *Paramount Parks, Inc.*, 195 F.3d 715 (4th Cir. 1999), the court applied to a private corporation the same principles applicable to lawsuits against municipalities. *Id.* at 728-729. A jury had determined that the owner of the Paramount's Kings Dominion amusement park acted unconstitutionally in arresting an African-American college student falsely suspected of having passed bad checks. The plaintiff argued on appeal that a corporate (analogous to municipal) "policy" was shown by the acquiescence of the Manager of Loss Prevention in a special police officer's "intention to effect Austin's * * * arrest on charges of forgery and uttering a forged writing." *Id.* at 729. In rejecting that argument and reversing the jury's verdict, the court of appeals relied on the fact that the *plaintiff* "presented no evidence that Hester [the alleged policymaker] had ever directed a special police officer to effect an arrest or that he had ever prevented the same." *Id.* at 730. Under the Ninth Circuit's logic in the present case, however, the burden should have been on the *defendant* to rebut the assumption that the alleged policymaker was in fact entitled to make policy for the defendant.

In *Johnson* v. *Hardin County*, 908 F.2d 1280 (6th Cir. 1990), a former prisoner persuaded a jury to hold a county liable on the theory that the elected county Jailer, Lawson, had been deliberately indifferent to his medical needs, and the court of appeals agreed that there was sufficient evidence to support a finding of deliberate indifference. *Id.* at 1284. The Sixth Circuit nevertheless reversed the judgment against the county, and directed entry of judgment for the county. The court noted

that the argument that Lawson was a policymaker was "difficult to address" because "of the lack of agreement among the members of the Supreme Court." *Id.* at 1285. Nevertheless, the Sixth Circuit discerned from this Court's rulings that the plaintiff "must have produced evidence from which a jury could reasonably conclude that Lawson was vested with final authority to set medical treatment policy for the county's prisoners." *Id.* at 1286. Because the plaintiff "introduced no evidence that indicates Lawson is vested with authority to make all of the county's medical *policy* decisions" (*id.* at 1287 n.4 (emphasis in original)), the jury verdict was reversed. Of course, under the Ninth Circuit's decision in this case, the result would have been different: deputy district attorneys have been presumed to be "policymakers" because they have statutory authority to make decisions about how to handle discrete cases, and the burden was placed on the defendant, not the plaintiff, to prove that municipal policymaking authority instead resided elsewhere.

Although these cases (and the decision below) apply state law to the question of who has final policymaking authority, *Johnson* and *Austin* rely on *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989), and other decisions of this Court for the proposition that the plaintiff must present some factual basis to establish that policymaking authority rests in a given individual or that custom and usage has attained the force of law. The Ninth Circuit has dispensed with any such inquiry, and this Court's review is warranted to resolve the different approaches courts of appeals are taking to this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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